Supreme Court of the United States

October Term, 1956

No. 415

Mitsuo Nishikawa,

Petitioner,

vs.

John Foster Dulles, as Secretary of State,

Reply to Memorandum of Respondent on Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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In its Memorandum, the Government does not oppose the grant of certiorari in this case (Memo, pg. 13).

However, it can hardly be said, as does respondent (Memo, pg. 12) that the constitutionality of Section 401(c) of the Nationality Act of 1940 "has now been established." No decision of this Court has so held. As authority respondent cites its own brief in *Gonzales v. Landon*, No. 111, Oct. Term, 1955. The contrary argument is set forth in petitioner's briefs in that case (Op. Br. pp. 6-18; Rep. Br. pp. 25-31), including the refutation of respondent's argument based upon *Mackenzie v. Hare*, 239 U. S. 299, and *Savorgnan v. United States*, 338 U. S. 491, also cited by respondent here (Memo. pg. 12).

It is noteworthy that after the remands by this Court of *Acheson v. Okimura*, 342 U. S. 899, and *Acheson v. Murata*, 342 U. S. 900, the trial court again held the statute unconstitutional (111 F. Supp. 303 and 306) and did so in the later reported case of *Terada v. Dulles*, 121 F. Supp. 6 (as to subsection (e)), as well as in several unreported cases. The Government took appeals in none of these cases.

In the latest case before this Court wherein the constitutional question was involved (*Gonzales v. Landon*, No. 111, Oct. Term, 1955), not only did this Court grant unlimited certiorari (349 U. S. 943), but in its opinion in deciding the case (350 U. S. 920) stated that it was not reaching the constitutional questions. While one may not be able to claim this action as conclusive authority that after the argument in *Gonzales* this Court felt the question to be open,[1] the overall action taken by this Court in that case on the problem is persuasive that that is the case. The opinion does make clear that the question has not been decided.

As the Government concedes (Memo. pp. 12, 13) the question of the constitutionality of the subsection here involved, as well as related provisions of the expatriation statute, is a continuing and recurring one. For example, see *Perez v. Brownell*, No. ....., Oct. Term, 1956, petition for writ of certiorari just filed. In the Supplement to

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[1]It can be said that it felt that way at the time of granting the petition.

the Petition for Writ of Certiorari in that case the suggestion was made that if this Court grants certiorari in that case and in this one, that the cases be set down for argument, one to follow the other. We respectfully make the same suggestion here.

Respectfully submitted.

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